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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT DAHMS, Plaintiff and Appellant, v. DOWNTOWN POMONA PROPERTY et al., Defendants and Respondents.	B183545 (Super. Ct. No. BS 092125) ORDER MODIFYING OPINION AND DENYING REHEARING (David P. Yaffe, Judge) [NO CHANGE IN JUDGMENT]

THE COURT:

IT IS ORDERED that the opinion filed herein on May 12, 2009, be modified in the following particulars:

1. At page 2, delete the entire language in footnote 1 and replace with the following:

> On remand from the Supreme Court, both parties submitted supplemental briefs pursuant to California Rules of Court, rule 8.200(b). Such briefs "must be limited to matters arising after the previous Court of Appeal decision in the cause, unless the presiding justice permits briefing on other matters." (Cal. Rules of Court, rule 8.200(b)(2).) Our presiding justice has not permitted briefing on

other matters, and none was requested. Consequently, any arguments raised in the supplemental briefs that could have been raised in the parties' original briefs will not be considered**.**

In his petition for rehearing, Dahms objects that only "clairvoyance" would have allowed him to anticipate the substance of *SVTA* so as to raise all of the necessary arguments in his original briefs. The argument fails. Any arguments that could have been raised in the original briefs (and thus do not require clairvoyance) but were not raised until the supplemental briefs will not be considered. Any arguments that could not have been raised until the supplemental briefs (such as arguments that depend essentially on new rules of law stated in *SVTA*) will be considered. Dahms' supplemental brief contains virtually no appropriate new arguments. It is, in the main, merely an attempt to reargue the entire appeal from the ground up. For example, in his supplemental brief Dahms argues that the PBID is unlawful because the engineer's report was certified after ballots were mailed to property owners. That argument could have been raised in Dahms' original briefs but was not, and *SVTA* sheds no light on its merits. Consequently, it and similar arguments in the supplemental briefs will not be considered.

Also on remand from the Supreme Court, Dahms moved to "correct" the record on appeal by "refiling" the "supplemental administrative record." We denied the motion. Because Dahms objects to that denial in his petition for rehearing, we now set forth the procedural background in some detail.

Five calendar days before trial of this matter in the superior court, Dahms filed a "motion to supplement administrative record," listing a number of documents and asserting, without elaboration or

evidence, that they "are part of the [a]dministrative [r]ecord in this case." The City opposed the motion, contending inter alia that "none of the items" Dahms sought to introduce was "ever part of the record" before the City. The record on appeal contains no ruling on Dahms' motion. The last page of the reporter's transcript contains the following statement by the trial court: "Whoever submitted these documents, please take them with you. The minute order will provide that we are returning these documents to you, and they are to be held by you and forwarded to any higher court to which this matter is brought." It is not clear from the court's statement what "documents" the court was referring to, and no minute order from the hearing, nor any other minute order referring to those "documents," was included in the record on appeal. Our records reflect that when this case was originally before us, Dahms filed the administrative record with this court but did not file his "supplemental administrative record." Dahms' original briefs in this court did not argue that the trial court erred by failing to grant his "motion to supplement administrative record." On remand from the Supreme Court, however, Dahms attempted to "refile" the "supplemental administrative record" in this court on the ground that the trial court had "ordered that it be included in the record on appeal," citing the statement of the trial court quoted *ante*. The trial court's statement does not indicate that the court "ordered that [the 'supplemental administrative record'] be included in the record on appeal." The parties, not the trial court, designate the materials to be included in the record on appeal, pursuant to California Rules of Court, rules 8.120-8.137. The trial court's statement indicates only that the minute order (which we have never seen) would reflect that

> the "documents" were returned to whichever party submitted them, and the court further advised the parties that they should retain all such documents for inclusion, as necessary or desired, in the record on appeal. Because (1) the trial court never granted Dahms' "motion to supplement administrative record," (2) nothing in the record before us indicates that the trial court ordered that the "supplemental administrative record" be included in the record on appeal, (3) Dahms did not argue either of those issues when this case was originally before us, and (4) Dahms did not file his "supplemental administrative record" in this court when this case was originally before us, we denied his motion, on remand from the Supreme Court, to "refile" the "supplemental administrative record."

2. On page 4, footnote 2, at the end of the first sentence and before the period, add the following text: "(e.g., rather than raise the other assessments, the City might have made up the difference by using other funding sources)" so that the first sentence now reads:

> Dahms does not contend that the lower assessments on the nonprofit parcels caused the assessments on other parcels to be higher than they otherwise would have been (e.g., rather than raise the other assessments, the City might have made up the difference by using other funding sources).

3. On page 6, at the end of the second paragraph under Section II, insert a footnote after the sentence ending "none of Dahms'arguments has merit" and add as footnote 4, the following footnote, which will require renumbering of all subsequent footnotes:

> Dahms recognizes that "[t]he record in assessment proceedings consists of the agency's resolutions, hearings, and processes, and the

> engineer's report required by [article XIII D]." In his supplemental brief on remand from the Supreme Court, however, Dahms appears to argue that the engineer's report must be sufficient *on its own* to show that an assessment meets *all* of the requirements of article XIII D. Insofar as Dahms' new argument is based on *SVTA*, it fails because *SVTA* never addressed the issue. Insofar as the argument is based on the text of article XIII D, it fails because (1) it could have been raised in Dahms' original briefs but was not (see footnote 1, *ante*), and (2) the text of article XIII D does not support it. Section 4, subdivision (b), of article XIII D provides that "[a]ll assessments shall be supported by a detailed engineer's report," but it does not provide that all assessments shall be supported *exclusively* by such a report, or by such a report *and nothing else*.

4. On page 15, after the second sentence in footnote 11, and before the parenthetical, insert the following sentence:

> That is, the City might have made up the shortfall resulting from the discounts by drawing on other sources of funds, rather than increasing the other assessments in the PBID to make up the difference.

This modification does not have an effect on the judgment.

Appellant's petition for rehearing is denied.

MALLANO, P. J. ROTHSCHILD, J. BAUER, J.*

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.